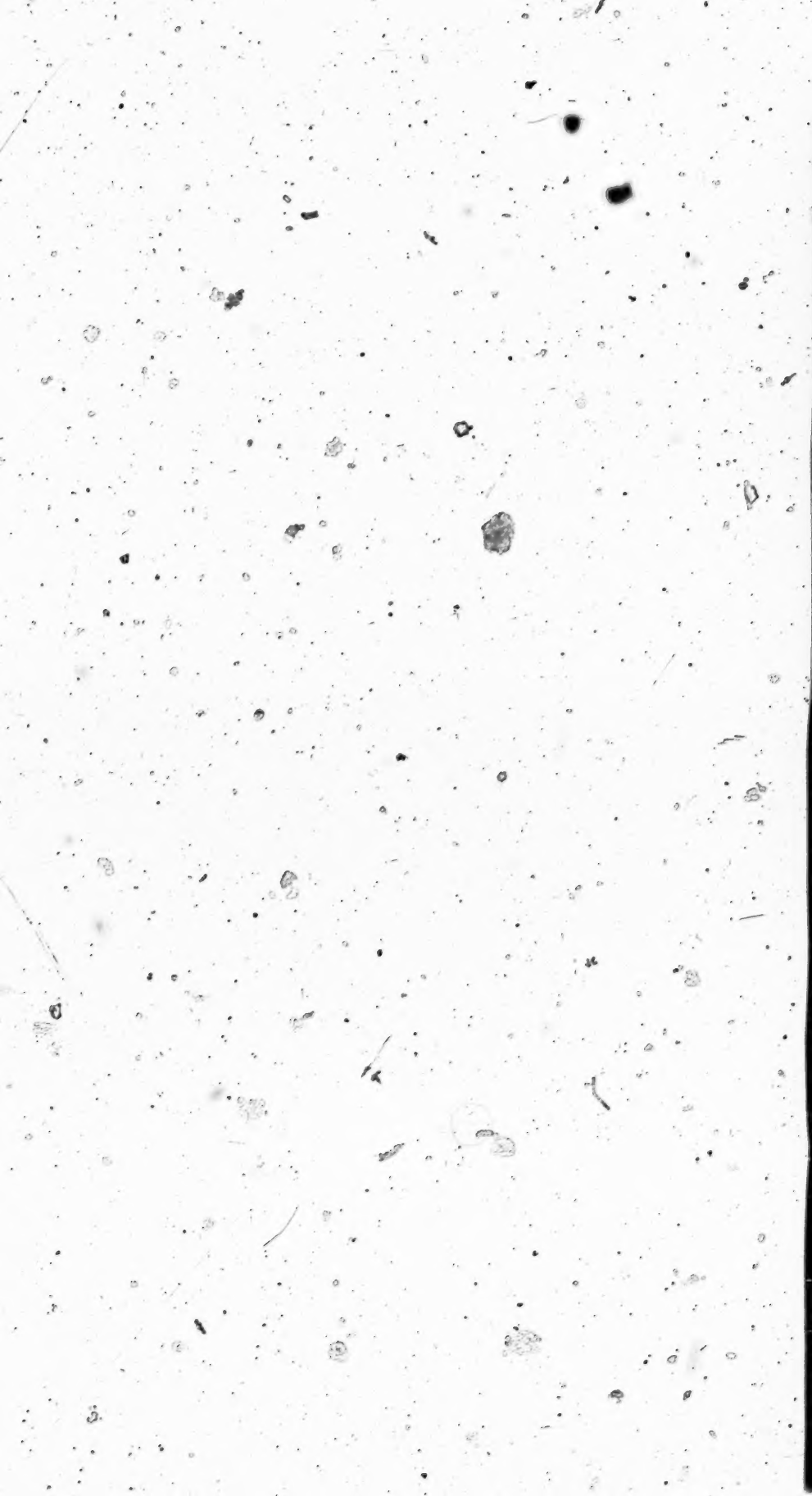

FILE COPY

Office - Supreme Court, U.S.
FILED
MAR - 8 1940
CHARLES ELMORE CROPLEY
CLERK

No. 587

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	9
Summary of argument	9
Argument:	
I. Section 6 of the Raker Act forbids the arrangement under the contract of July 1, 1925, irrespective of whether the Company acts as an agent for sale or as a buyer for resale of the energy delivered to it	12
II. The contract of July 1, 1925, is a contract to sell energy for resale and as such is within the prohibition of the Raker Act	22
1. The Company does not account for the proceeds of energy sold, but pays a price for energy bought	24
2. The Company sells Hetch Hetchy energy to the City	29
3. The Company fails to segregate revenues derived from Hetch Hetchy energy	30
4. The Company names itself as sole creditor in bills to consumers	31
5. The Company is not subject to the City's direction in the fixing of rates to consumers	31
6. The Company has complete control of the energy	32
7. The Company bears the risk of loss	33
Conclusion	34

CITATIONS

Cases:	
Aetna Powder Company v. *Hildebrand*, 137 Ind. 462	25, 27
Arbuckle v. *Gates & Brown*, 95 Va. 802	25
Arbuckle Bros. v. *Kirkpatrick*, 98 Tenn. 221	25, 33
Bank of America v. *Whitney Bank*, 261 U. S. 171	22
Blackstone v. *Miller*, 188 U. S. 189	22
Borland v. *Nevada Bank*, 99 Cal. 89	20

Cases—Continued. Page

Chickering v. *Bastress*, 130 Ill. 206 ..... 31, 33
Cole v. *Laird*, 121 Iowa 146 20
Coweta Fertilizer Co. v. *Brown*, 163 Fed. 162 ..... 11, 33
Donlan v. *Turner & Dennis & Lowry Lumber Co.*, 282 Fed. 421 34
D. M. Ferry & Co. v. *Hall*, 188 Ala. 178 ..... 23, 31, 33
Dresser v. *Zabriskie*, 39 Atl. 1066 18
Ex Parte White, L. R. 6 Ch. App. 397 27
Farmers Loan Co. v. *Minnesota*, 280 U. S. 204 22
Federal Trade Comm. v. *Raladam Co.*, 283 U. S. 643 15
Galloway v. *Chatham R. R. Co.*, 63 N. C. 147 ..... 10, 18
Green County v. *Quinlan*, 211 U. S. 582 23
Gregory v. *Helvering*, 293 U. S. 465 24
Helvering v. *Hallock*, Nos. 110, 111, 112, 183, 399, this Term 22
Heryford v. *Davis*, 102 U. S. 235 ..... 23, 24
Higgins v. *Smith*, No. 146 this Term 24
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229 21
Horning v. *District of Columbia*, 254 U. S. 135 24
Howard v. *Hancock Oil Co.*, 68 F. 2d 694 ..... 11, 25
Humphrey's Executor v. *United States*, 295 U. S. 602 15
In re Caldwell Machinery Co., 215 Fed. 428 31
In re Chalmers, 206 Fed. 143 27
In re Leflys, 229 Fed. 695 ..... 25, 30, 31
In re Linforth, 15 Fed. Cas. No. 8,369 ..... 25, 31
In re Rabenau, 118 Fed. 471 ..... 11, 25, 33
In re United States Electrical Supply Co., 2 F. 2d 378 ..... 23, 30, 31
In re Wayside Furniture Co., 67 F. 2d 201 31
In re Wells, 140 Fed. 752 ..... 25, 30, 31
In re Wood, 140 Fed. 964 ..... 25, 33
Kelley, Maus & Co. v. *Sibley*, 137 Fed. 586 23
Lance v. *Butler*, 135 N. C. 419 31
Los Angeles G. & E. Corp. v. *Los Angeles*, 188 Cal. 307 29
Ludwig v. *American Woolen Co.*, 231 U. S. 522 24
Mansfield v. *District etc. Assoc.*, 154 Cal. 145 20
Mennis v. *Manning & Co.*, 136 Ill. App. 406 33
Mitchell Wagon Co. v. *Poole*, 235 Fed. 817 27
Norwegian Plow Co. v. *Clark*, 102 Iowa 31 33
Nutter v. *Wheeler*, 18 Fed. Cas. No. 10,384 ..... 25, 27
O'Brien v. *Miller*, 168 U. S. 287 23
Oregon & Cal. R. R. v. *United States*, 238 U. S. 393 ..... 11, 35
Reichelderfer v. *Quinn*, 237 U. S. 315 17
Smith v. *Burnet*, 35 N. J. Eq. 314 ..... 10, 18
Speigle v. *Meredith*, 22 Fed. Cas. No. 13,227 20
Standard Co. v. *Magrane-Houston Co.*, 258 U. S. 346 ..... 11, 25, 33
Standard Ins. Co. v. *United States*, 302 U. S. 442 17
State v. *Bove*, 98 N. J. L. 350 18
State v. *Standard Oil Co.*, 49 Ohio St. 137 22
Straus v. *Victor Talking Mach. Co.*, 243 U. S. 490 ..... 11, 33
The Elgee Cotton Cases, 22 Wall. 180 34

Cases—Continued. Page

Utah Power & L. Co. v. *Pfost*, 286 U. S. 165 34
Vermont Marble Co. v. *Brow*, 190 Cal. 236 27
Wood M. & R. Co. v. *Brooke*, 30 Fed. Cas. No. 17,980 33

Statute:

Raker Act of December 19, 1913, c. 4, 38 Stat. 242 ..... 2, 3, 9, 22, 23, 34
Sec. 6 ..... 3, 4, 9, 10, 12, 14, 15
Sec. 9 (e) 4
Sec. 9 (m) 4, 14
Sec. 9 (u) 35

Miscellaneous:

50 Cong. Rec., pp. 3905, 3996, 3997, 3999, 4093, 4097, 4099, 4110, 5473 16
51 Cong. Rec., pp. 6-7, 132, 136, 182, 273, 343, 344-345 ..... 15, 16
H. Rept. 41, 63d Cong., 1st sess., 1913, p. 11 ..... 10, 14
O. W. Holmes, Jr., Agency, 4 Harv. L. Rev. 345 22
1 Mechem, Agency (2d ed.), sec. 1335 30
1 Mechem, Sales, sec. 43 25
1 Restatement, Agency (1933), sec. 1; sec. 1, coms. a and b; sec. 14; and sec. 14, com. b 33
4 Williston, Contracts (Rev. ed. 1936), secs. 962, 963 34

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 587

UNITED STATES OF AMERICA, PETITIONER

v.

CITY AND COUNTY OF SAN FRANCISCO, A MUNICIPAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the trial court (R. 90–125) is reported in 23 F. Supp. 40. The opinion of the circuit court of appeals (R. 661–677) is reported in 106 F. 2d 569.

JURISDICTION

The decree of the circuit court of appeals was entered on September 13, 1939 (R. 678). Petition for a writ of certiorari was filed December 12, 1939, and was granted on January 29, 1940 (R. 681). The jurisdiction of this Court rests upon section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

By the Raker Act of December 19, 1913, the United States granted lands and rights-of-way to the City and County of San Francisco for a power project but prohibited the "selling or letting" to any private corporation of "the right to sell or sublet" the electric energy "sold or given to it" by the City. Thereafter the City entered into an agreement with a private corporation under which the City, at a price fixed without regard to actual revenues, delivers energy to the corporation for transmission and sale to consumers. The corporation is not subject to the City's direction in the fixing of rates to consumers, but has complete control of distribution and collections and bears the risk of loss.

The questions are: ——

1. Whether the agreement is prohibited even if its effect is to grant to the corporation the right to sell energy only as agent for the City.

2. Whether, assuming that the Act prohibits only the sale of energy for resale, the agreement provides for such a sale or merely grants the right to sell energy as agent for the City.

STATUTE INVOLVED

The Raker Act of December 19, 1913, c. 4, 38 Stat. 242, printed as an exhibit (R. 12–36, 192–216), is set forth in part at page 4 of the Statement below.

STATEMENT

On April 27, 1937, the United States brought this suit in the Northern District of California to enjoin the City and County of San Francisco (hereafter called the City) from disposing of electric energy to the Pacific Gas and Electric Company (hereafter called the Company) under a contract and in a manner asserted to be in violation of section 6 of the Raker Act of December 19, 1913, 38 Stat. 242 (R. 2–12).

The City in its answer (R. 41) denied violation of the Act, alleging that the energy is distributed by the Company as agent for the City (R. 48).

The district court concluded that the City under the contract disposes of the right to sell energy in violation of section 6 of the Act (R. 164–167) and entered a decree enjoining the City from disposing of energy under the contract or in any other manner whereby the right to sell or sublet such energy is vested in any individual or corporation other than a municipality (R. 168–170). The circuit court of appeals, only two judges participating, reversed, with instructions that the complaint be dismissed (R. 678). It held that the contract is one of agency rather than sale and that the Act does not prohibit the sale of energy by the Company as agent for the City (R. 661–677).

In brief, the facts are as follows:

The Hetch Hetchy project.—Congress passed the Raker Act (R. 12–36, 192–216) on December 19, 1913, to permit the use of public lands by the City

for a water supply and hydroelectric project. The Act grants to the City lands in Yosemite National Park and in the Stanislaus National Forest for the project, which consists of reservoirs, dams, powerhouses, and other structures essential to water and electric systems. The Act also grants rights-of-way for water conduits, power lines, roads, and communication lines in the Park and Forest and in the public lands along the route between the Hetch Hetchy reservoir and Newark, California (sec. 1).

By section 9 the grant is made subject to the City's observance of all the conditions of the Act. Among these conditions is the provision (sec. 9 (m)) that the grantee—

> shall develop and use hydroelectric power for the use of its people and * * * sell or supply such power for irrigation, pumping, or other beneficial use * * *.

Any excess remaining after satisfaction of specified public uses may be disposed of for private consumption (sec. 9 (l)).

Section 6, here sought to be enforced, provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: * * *.

The grant with "all the terms and conditions therein contained" was accepted by the City by

formal ordinance approved January 13, 1914 (R. 217-220).

By 1925 the City had completed both its main power plant at Moccasin Creek, which utilizes water from the Hetch Hetchy reservoir, and a transmission line from the plant to Newark, about 40 miles southeast of San Francisco (R. 281–282, 307–308).

Thereupon it entered into the contract with the Pacific Gas and Electric Company which inaugurated the arrangement here in question (R. 76–90). The contract uses the terminology of consignment, and declares that the City employs the Company "as temporary distributor" for the City (R. 80). It provides for the delivery of the entire energy output of the Moccasin plant to the Company at Newark at not to exceed a 75-percent monthly load factor.[1] The Company agrees to furnish all necessary peak-load and steam stand-by services, to collect the charges, and to "make accounting to" the City each month for 76 percent of the energy delivered to it at a rate of 26.935 percent of 2.383 cents per kilowatt-hour.[2] The Company is to re-

[1] Load factor is the ratio between the average actual load and the maximum load capacity of the plant (R. 299). Under the contract, for example, if the maximum monthly production capacity of the Moccasin plant were 100,000 kilowatts, the Company would be required to accept or pay for not more than 75,000 kilowatts per month.

[2] The contract recites that the average transmission and distribution losses of energy from the Newark substation to

tain the remaining 73.065 percent of the 2.383 cents per kilowatt-hour as its "compensation for services rendered" (R. 80–81, 83). Upon the failure of the Company to take all of the energy available under the contract, the monthly payment to be made to the City is to be computed on the basis of the amount of energy which the City could have delivered (R. 84–85).

Operation under the contract of July 1, 1925.— The lands granted by the United States are now being used in connection with and are indispensable to the operation of the project (R. 6, 43–44, 160, 281). All of the energy delivered by the City at Newark is generated with water stored on and conducted over such lands, and the energy itself is transmitted over such lands (R. 280–282, 307–308, 411, 428).[3] The power passes from the lines of the

---

consumers in San Francisco is 24 percent, and that 2.383 cents is the average revenue per kilowatt-hour received by the Company in San Francisco in 1924 (R. 79–80, 82–83). The contract also provides that if the established rates are increased or decreased by lawful authority, the amount to be retained by the Company and the amount to be paid to the City shall be proportionately increased or decreased.

[3] Since 1935 the output of the Early Intake plant built in 1918 to supply power for construction of the project (R. 407) and using water from Lake Eleanor Reservoir in Yosemite Park (R. 282) has been diverted into the transmission lines from the Moccasin plant and is disposed of on the same terms as is the power from that plant (R. 411, 428–429). In the trial court's findings (R. 161) and throughout this brief energy generated at both the Moccasin and Early Intake plants is referred to as originating at Hetch Hetchy.

City to those of the Company at Newark, where it merges with energy from other sources in the Company's power pool. The City's compensation is based upon the Newark meter readings (R. 283–285, 291, 305). The rate of generation and the output of the City's Moccasin plant is controlled exclusively by the system load dispatcher, who is an employee of the Company alone (R. 282–284, 302). Through him its control is integrated with the control of other plants owned by the Company, and the method of such control differs from that of company-operated plants only by reason of the contract provision for delivery at a 75-percent monthly load factor (R. 284, 303).

Bills to customers are issued under the name of the Company and do not indicate that the Hetch Hetchy plants are the source of the power (R. 285). The City itself is a customer-consumer of energy for its municipal railways, street lights, and public buildings, and is billed by the Company at the same rates as those charged other municipal corporation consumers, without regard to the volume or price of the Hetch Hetchy energy delivered to the Company at Newark (R. 285–286, 293).

As the result of rate reductions, the average revenue of the Company per kilowatt-hour for 1935 was 2.361 cents; for 1936, 2.238 cents; and for 1937, 2.113 cents (R. 287, 301). These rates were equivalent to decreases from the contract rate (2.383 cents) of 1, 6, and 11 percent, respectively, or an

average of 6 percent (R. 296–297). But compensation to the City was not decreased and it is still being paid on the basis of 2.383 cents as the average return per kilowatt-hour (R. 288–290).

The position of the Secretary of the Interior.— In August 1925 Secretary Work twice declined to rule on the validity of the contract, stating that the matter should be determined at some later date after operation (R. 339–340, 356–357).[4] On November 8, 1930, Secretary Wilbur by memorandum to the Mayor of the City stated that indefinite continuance of the contract could not be permitted (R. 238–239). A month later, in a letter to the City Attorney, he referred to the "City's three-year program for compliance with the provisions of the Raker Act respecting power distribution" and asked to be advised of completion (R. 322–323).

After a public hearing in May 1935 (R. 224–226, 228–229, 233), Secretary Ickes concluded that the

---

[4] In 1923 Solicitor Edwards of the Department of the Interior ruled that section 6 of the Act prohibited sale for resale of surplus energy from the Early Intake plant, and, relying on its legislative history, asserted that the Act clearly contemplates public ownership, sale, and distribution (R. 346–351). However, he suggested the feasibility of an agreement for *transmission* of the City's power over privately owned lines (R. 234, 353–354). A communication of the Acting Solicitor of the Department of the Interior to the Secretary in July 1925 stating that the contract in form was one of sale (R. 359–366) was not adopted by the Secretary (R. 234–236).

contract was in violation of the Raker Act (R. 230–269), and on April 2, 1937, after futile negotiations and efforts to secure action by the City (R. 276–278), he requested the Attorney General to bring this suit (R. 274–279).

SPECIFICATION OF ERRORS TO URGED

The circuit court of appeals erred:

(1) In holding that section 6 of the Raker Act does not prohibit the granting to private corporations of the right to sell electric energy originating at Hetch Hetchy as agent for the City.

(2) In failing to hold that the contract of July 1, 1925, between the City and the Company is a contract to sell energy for resale, prohibited by section 6 of the Raker Act.

SUMMARY OF ARGUMENT

I

Section 6 of the Raker Act prohibits the City "from ever selling or letting" to any private corporation "the right to sell or sublet the water or electric energy sold or given to it" by the City. These words forbid any grant for a consideration of the right to sell Hetch Hetchy energy, regardless of whether title to the energy is transferred to the Company. The legislative history of the statute shows that Congress intended by section 6 to prohibit monopoly—control of the right to sell—by a private corporation, and especially by the Pacific Gas and Electric Company, as well as to provide

for sale to consumers exclusively by the City and to bring the energy from Hetch Hetchy into direct competition with the power supplied by private corporations. H. Rept. 41, 63d Cong., 1st sess., 1913, p. 11. Read in the light of this manifest purpose, section 6 of the Raker Act plainly prohibits the City from granting to the Company for a consideration the right to sell energy, whether "sold" or only "given" to the Company in the broad sense of a mere transfer of possession without passage of title. Cf. *Smith* v. *Burnet*, 35 N. J. Eq. 314, 324 (1882); *Galloway* v. *Chatham R. R.*, 63 N. C. 147, 154 (1869). The City cannot evade the prohibition against selling the right to sell its energy by resort to the legal fiction that "sale by an agent is the sale of the principal" where, as here, it does not make its own sales through a mere employee. This is all the more true because the City in this case has for a consideration endowed the Company with a valuable contract right to sell the City's energy on the Company's account.

II

In any event, the disposition of energy to the Company under the contract is a sale for resale, which is clearly prohibited by the statute, as the City concedes (Br. in Opp. to Pet. for Cert. p. 15). The character of the contract cannot be determined by the form and name applied to it by the parties, but only by the real nature of the transaction con-

templated by its terms. Its many phases must be viewed as a whole and not merely analyzed *seriatim*. Its true character as a contract of sale is disclosed by the facts that under it the Company (1) is obligated to pay for the energy a price bearing no direct relation to the revenue received from consumers, rather than to make a mere accounting of revenues collected, cf. *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Howard* v. *Hancock Oil Co.*, 68 F. 2d 694, 698 (C. C. A. 9); (2) sells energy which originates at Hetch Hetchy to the City at a price having no relation to the terms of the contract; (3) fails to segregate revenues derived from Hetch Hetchy energy; (4) names itself as sole creditor in bills to consumers; (5) is not subject to the City's direction in the fixing of rates to consumers; (6) has complete control of the energy, *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490, 499; and (7) bears the risk of loss, *Coweta Fertilizer Co.* v. *Brown*, 163 Fed. 162, 165 (C. C. A. 6); *In re Rabenau*, 118 Fed. 471, 477 (W. D. Mo.). Considered together, as they must be, these characteristics of the arrangement furnish the strongest evidence that the transfer of the energy to the Company was a sale by the City.

Since, irrespective of transfer to the Company of title to the energy, the City's course is a persistent violation of the statute, the United States is entitled to have its infringement enjoined. *Oregon & Cal. R. R.* v. *United States*, 238 U. S. 393.

ARGUMENT

I

SECTION 6 OF THE RAKER ACT FORBIDS THE ARRANGEMENT UNDER THE CONTRACT OF JULY 1, 1925, IRRESPECTIVE OF WHETHER THE COMPANY ACTS AS AN AGENT FOR SALE OR AS A BUYER FOR RESALE OF THE ENERGY DELIVERED TO IT

Section 6 of the Raker Act prohibits the City "from ever selling or letting" to any private corporation or individual "the right to sell or sublet the water or electric energy sold or given to it or him by the" City. While the Government does not take the position that the statute inhibits the employment of the Company as a carrier for the transmission of power generated by the City, provided the sales are made by the City, it does contend that the prohibition of the statute applies to any arrangement whereby for a consideration the City grants to a private corporation *the right to sell,* in any capacity, energy made available to it from Hetch Hetchy.

If title to the energy passes from the City to the Company without reservation, this necessarily carries with it the prohibited right to sell, and the City concedes that the selling of the energy with the right of resale is prohibited by the Act (Br. in Opp. to Cert. p. 15). The district court decided that title passed to the Company but was reversed on this

point by the circuit court of appeals. It is not necessary, however, for this Court to consider the Government's argument in this respect in Point II of this brief, if, as the Government contends, the statute prohibits the City from granting to the Company for a consideration a right to sell regardless of whether such grant is accompanied by a transfer of title.

The language of the prohibition broadly covers all "selling or letting" to private corporations of the right to sell and contains no exception with respect to agents. There is no requirement in the statute that title to energy should accompany the transfer of the right to sell; and to imply one would do violence to the plain words of the statute. If Congress had intended to limit its prohibition to a sale of energy for resale, it would have sufficed simply to make the object of the prohibition the restrictive words "energy for resale" instead of the more comprehensive phrase "the right to sell." The words of the statute, on their face, are plainly and simply expressive of a policy against the sale by private corporations or individuals of energy developed through use of the public resources. Since, under the contract here in question, the Company, either as owner of the energy or as agent of the City, does sell Hetch Hetchy energy, it runs afoul of this expressed policy and violates the statute.

214864—40——3

That this section of the Act was framed to prevent the public grant from becoming a private monopoly is evident from the wording of the statute alone. It is disclosed not only by the prohibition against "selling or letting" "the right to sell or sublet," but also by the condition of section 9 (m) that the City "shall develop and use" the "power for the use of its people and * * * sell or supply such power for * * * beneficial use."

The legislative history of the Act reveals the same purpose. The favorable report of the House Committee on Public Lands (H. Rept. No. 41, 63d Cong., 1st sess. (1913) p. 11) states as to section 6:

> This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco.[5]

It had long been the policy of the Government to preserve the national parks inviolate from private commercial exploitation, and, obviously, in enacting the Raker Act Congress determined that this policy could best be attained by preventing private interests, especially the Pacific Gas and Electric Company and its associates (R. 265), from acquiring any right to sell energy produced through use of national park lands. The decision below permits the respondent and the Pacific Gas and Elec-

---

[5] Since section 6 prohibits, in identical terms, the selling of the right to sell water and electric energy, it is plain that the purpose expressed in the report is equally applicable to both water and electric energy.

tric Company to make effective a different policy of their own choosing. Common agreement on the part of the legislators as to the purpose to prevent monopoly and to achieve direct sale of the energy by the City to consumers was demonstrated throughout the Congressional debates.[6]

Senator Norris, a member of the Senate Public Lands Committee which reported the bill, stated (51 Cong. Rec. 343, December 6, 1913):

> This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. * * *
>
> Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have, or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.

After reading from a report of the Bureau of Corporations dated March 14, 1912, showing a virtual electric power monopoly in the Pacific Gas and Electric Company and associated companies (see R. 265), he said that the bill—

---

[6] Resort may be had by the courts to congressional debates to determine the purpose of an enactment when there was common agreement as to the purpose. *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 625.

> if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition. * * * if the power of the Hetch Hetchy is developed it will come into direct competition with what a sworn official of the Government says is a monopolistic control of the hydroelectric power of California (51 Cong. Rec. 344–345).

Senator Pittman, one of the bill's sponsors, declared, "It provides absolutely that neither this water nor this power can ever fall into the hands of a monopoly," and indicated that it would aid in relieving the people of the area which it would serve "from the monopoly that has been supplying them with light and power in that section of the country for years" (50 Cong. Rec. 5473).

Representative Raker of San Francisco, author of the bill, agreed in debate that its purpose was to "have San Francisco supply electric power and water to its own people" (50 Cong. Rec. 3905).

Other statements throughout the debate[7] demonstrate unanimity of purpose, to provide for sale exclusively by the City directly to consumers and

---

[7] See especially remarks of Rep. Ferris, Chairman of the House Lands Committee in charge of the bill, 50 Cong. Rec. 4093, and of Rep. Thomson, member of the same committee, 50 Cong. Rec. 3999, 4097; see also 50 Cong. Rec. pp. 3996, 3997, 4099, 4110; 51 Cong. Rec., pp. 6–7, 132, 136, 182, 273.

to bring the energy from Hetch Hetchy into direct competition with the power supplied by privately owned utility companies. Because there could be no competition between the City's and the Company's generating plants if the sale and control of the output of both were reposed in the Company, it was necessary, in order to achieve the object of effective competition, for Congress to forbid the City from selling to private corporations or individuals the right to sell the energy. This is precisely what Congress did.

Statutes are to be liberally construed in aid of their evident public objects. *Standard Ins. Co.* v. *United States,* 302 U. S. 442, 444; *Reichelderfer* v. *Quinn,* 287 U. S. 315, 321. In granting to the Company for a consideration the right to sell the energy, the City has violated both the letter and the purpose of the Act.[8]

---

[8] The City contends that application of section 6 of the Raker Act to sales by an agent is prevented by its alleged construction by government officials as forbidding sale of energy for resale and nothing more (Additional Br. in Opp. pp. 17, 18, 21–31). It is, however, submitted that the statute is unambiguous. If there were, however, any such ambiguity as to permit resort to administrative interpretations, it is clear that no such interpretations in this record support the City's position. Secretary Wilbur's letter of 1930 (R. 322) was absolutely noncommittal; and the ruling of Secretary Ickes in 1935 that the Act prohibited a sale of energy for resale (R. 247) gives rise to no implication that sales by an agent are not also prohibited. The same is true of the opinion of Solicitor Edwards in 1923. His suggestion as to the feasibility of an agreement for transmission of the City's power over privately owned lines (R. 234, 353–

Arguments based upon linguistic refinements of the statute add little to that based upon its rational intent. A very brief analysis of the phraseology, however, may be of assistance. The statute prohibits the City "from ever selling or letting" to any private corporation or individual "the right to sell or sublet the water or electric energy sold or given to it or him by the" City. The "selling" expressly [9] prohibited is not the selling of energy, but the selling of the right to sell energy.

The prohibition of the statute applies to the right to sell electric energy "given" to private corporations as well as energy "sold" to them. This phrase "sold or given" embraces every means by which electric energy can be supplied to a corporation. The word "given" as here used evidently refers to any transfer of possession. Cf. *State* v. *Bove*, 98 N. J. L. 350, 354 (1922); *Galloway* v. *Chatham R. R.*, 63 N. C. 147, 154 (1869); *Dresser* v. *Zabriskie*, 39 Atl. 1066, 1067 (N. J. Ch. 1898). It is immaterial whether title passes. Cf. *Smith* v. *Burnet*, 35 N. J. Eq. 314, 324 (1882). Concededly, the word was not used with the idea that the City

---

354) has no bearing on the validity of a grant to an agent of the right to sell. The opinion of Acting Solicitor Wright in 1925 was not adopted by the Secretary, who merely wrote the Mayor deferring action pending the availability of further facts (R. 234–236).

[9] The selling of energy for resale is prohibited by necessary implication in that a sale of energy without reservation necessarily confers on the purchaser a right to sell what he has purchased.

would make donations of energy to private corporations, and to construe it as synonymous with "sold" would deprive it of any meaning. Hence, it is submitted that by using the word "give" Congress must have intended to prohibit sale of the right to sell energy transferred for distribution but not sold to the distributing agent.

It is thus apparent from the words and purpose of the statute that any contract by which the City for a consideration grants to a private corporation the right to sell Hetch Hetchy energy is forbidden, irrespective of whether title to the energy has also been transferred to the corporation.

The arrangement under the contract of July 1, 1925, plainly involves a grant by the City to the Company for a consideration of the right to sell Hetch Hetchy energy, irrespective of the transfer to the Company of title to the energy. Congress of course did not intend to prohibit the City from selling energy through its own employees. Rather, it intended that the City should do so and thus put its energy into competition with that of private corporations.[10] The issue thus resolves itself into the question whether the City has reduced or could reduce this great Pacific Coast power utility to the status of a mere employee. The Government sub-

[10] Furthermore, it may be that in selling energy through its own employees, the City would not be transferring to them a right to sell sufficiently partaking of the nature of a property right to be the subject of the "selling or letting" prohibited by the Act.

mits that an independent corporation dominating the power industry on the Pacific Coast could never be regarded as a mere employee of the City of San Francisco—certainly not for the purpose of evading the Act's objective to furnish competition to this very monopoly. But even if this were possible the Government submits that, far from making the Company its employee in this case, the City has for a consideration endowed it with a valuable contract right to sell the City's energy on the Company's account.

There can be no question but that the Company furnishes a valuable consideration for the privileges of sale which it enjoys. The contract requires it to accept and pay for a fixed minimum of energy each month (R. 84–85) and also to furnish peak load and steam stand-by services (R. 81). This is ample to support a sale. See *Speigle* v. *Meredith*, 22 Fed. Cas. No. 13,227 at p. 911 (C. C. Ind.); *Borland* v. *Nevada Bank*, 99 Cal. 89, 93 (1893); *Cole* v. *Laird*, 121 Iowa 146, 149 (1903); *Mansfield* v. *District, etc., Assoc.*, 154 Cal. 145, 147–148 (1908). In exchange for this consideration, fixed quite without relation to actual revenues (R. 163), the City has granted the Company a valuable contract right to sell the energy in its own way, on its own terms, and to its own advantage. This grant is a "selling" prohibited by the Act, and the question whether a right of sale can itself be the subject of a sale is settled, certainly for the purposes of this case, by

the statutory prohibition against sale of the right to sell, which necessarily implies that the mere right to sell may be sold within the meaning of the Act.

Even though the contract is terminable on one day's notice, it remains a valuable property right, *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 251–252, and the Act as thoroughly forbids the sale of a right to sell for one day as for a hundred years.[11] The best proof of the value of the right is the fact that as actually enjoyed under the contract it has been so extensive as to make ludicrous by contrast the provision for termination. Years have passed and the Company has continued to exercise its valuable right of sale unchecked, and when the Secretary of the Interior felt compelled to insist on its termination, his efforts were continuously thwarted (R. 276–278) and even now are being stubbornly resisted at the bar of this Court. Thus for nearly fifteen years the very corporation whose monopolistic control of power the Raker Act was designed to check has been enjoying the right to sell Hetch Hetchy energy.

---

[11] The further provision for immediate cancellation upon request of the Secretary of the Interior should he hold that the agreement violates any provision of the laws of the United States (R. 86) does not, of course, add anything to the provision for termination on twenty-four hours' notice. As a matter of fact, when the Secretary did find that the agreement violated the terms of the Raker Act (R. 230–269), the parties refused to invoke the cancellation provision and compelled him to institute this suit (R. 272–273).

The circuit court of appeals disposed of the Government's contention that the Act prohibits the Company from selling the energy as agent of the City in ten words: "Sale by an agent is the sale of the principal" (R. 674). This fiction is no reason for a conclusion that a sale by the Company in the instant case is a sale not by the Company but by the City within the meaning of the Raker Act. Cf. *Bank of America* v. *Whitney Bank*, 261 U. S. 171; O. W. Holmes, Jr., Agency (1891), 4 Harv. L. Rev. 345, 351. Congress did not legislate in terms of legal fictions. To hold that the Act does not prohibit these sales by the Company because in law they must be regarded as sales by the City and not by the Company is to employ a fiction to evade the plain purposes of the Act. When logic and the policy of a statute conflict with a fiction, the fiction must give way. *Blackstone* v. *Miller*, 188 U. S. 189, 206 (cf. *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204); *State* v. *Standard Oil Co.*, 49 Ohio St. 137 (1892); cf. *Helvering* v. *Hallock*, Nos. 110, 111, 112, 183, 399, this Term, decided Jan. 29, 1940.

II

THE CONTRACT OF JULY 1, 1925, IS A CONTRACT TO SELL ENERGY FOR RESALE AND AS SUCH IS WITHIN THE PROHIBITION OF THE RAKER ACT

Only if this Court is of the opinion that the prohibition of the statute extends solely to a contract of sale for resale, which respondent concedes is prohibited by the Act (Br. in Opp. to Cert. p. 15),

will it be necessary to consider the Government's contention that in any event the contract here involved is a contract of the City to sell energy to the Company and that the disposal of the City's energy to the Company thereunder is a sale for resale in violation of the Raker Act.

The true character of the contract is not determined by its mere form or by the name applied by the parties to it or to any act done under it. *Heryford* v. *Davis,* 102 U. S. 235, 243–244; *Kelley, Maus & Co.* v. *Sibley,* 137 Fed. 586, 591 (C. C. A. 7). There is no magic in the use by the parties of the words "consignment" or "agency." *In re United States Electrical Supply Co.,* 2 F. 2d 378–380 (S. D. Ill.); *D. M. Ferry & Co.* v. *Hall,* 188 Ala. 178, 186–187 (1914). The true legal effect of the instrument is to be gathered from the real nature of the transactions authorized or contemplated by its terms. *O'Brien* v. *Miller,* 168 U. S. 287, 297; *Green County* v. *Quinlan,* 211 U. S. 582, 594.[12]

[12] The circuit court of appeals said in its opinion: "Although the mere terminology used in a contract will not necessarily determine its character, the court should give effect to the express intent of the parties unless the electric energy is actually sold to the Company." It is no doubt a general principle of law that where no public interest is involved and the parties have a legitimate end in view, their written instruments are to be construed if possible to effectuate their intent. But where, as here, the parties use terms to avoid the requirements of the law, no principle requires a construction favorable to the effectuation of such terms. On the contrary, it is the plain duty of the courts to give full effect to the congressional policy embodied in the legis-

In determining what the real nature of the agreement is, all phases of the relationship should be viewed as a whole rather than merely analyzed *seriatim* to test whether they indicate a contract of sale or one of agency. *Ludvigh* v. *American Woolen Co.*, 231 U. S. 522, 528; *Heryford* v. *Davis*, 102 U. S. 235, 243–244. If the analysis of the entire relationship shows that the energy is sold to the Company under the contract, the transaction is concededly prohibited by section 6 (Br. in Opp., p. 15). The Government contends and the trial court found (Finding X, R. 164–165) that there was such a sale. The evidentiary findings were amply supported by the evidence and were not questioned by the circuit court of appeals (R. 161–166, 668–674). It is submitted that the circuit court of appeals erred in holding that under the facts found the agreement was as a matter of law one of agency.

1. *The Company does not account for the proceeds of energy sold, but pays a price for energy bought.*—Probably the most significant element to be determined is whether the obligation which the Company assumes under the contract is to pay a

---

lation sought to be evaded, and the transactions of the parties should be viewed in the light of the statutory purpose rather than from the standpoint of effectuating avoidance of the statute if possible. *Higgins* v. *Smith*, No. 146, this Term, decided Jan. 8, 1940; *Gregory* v. *Helvering*, 293 U. S. 465; *Horning* v. *District of Columbia*, 254 U. S. 135, 137.

price for the energy received by it or available for delivery to it, or whether its obligation is merely to make an accounting to the City for the proceeds received from the sale of the energy. See 1 Mechem, Sales (1901) sec. 43, pp. 41–42. If, as the Government contends, the obligation is to pay a price, this factor is virtually conclusive of the existence of a sale. Cf. *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Howard* v. *Hancock Oil Co.*, 68 F. 2d 694, 698 (C. C. A. 9); *In re Leflys*, 229 Fed. 695 (C. C. A. 7); *In re Wells*, 140 Fed. 752, 754 (M. D. Pa.); *In re Rabenau*, 118 Fed. 471 (W. D. Mo.); *In re Wood*, 140 Fed. 964 (M. D. Pa.).

Under the contract the proceeds of the sale to the consumers belong to the Company without duty to account therefor (R. 164). This not only shows that the Company did not act as agent in collecting revenues, but further indicates that the contract was one of sale. *In re Linforth*, 15 Fed. Cas. No. 8,369 at 560 (C. C. Cal.); *Nutter* v. *Wheeler*, 18 Fed. Cas. No. 10,384 at 499 (Mass.); *Arbuckle* v. *Gates & Brown*, 95 Va. 802, 805 (1898); *Arbuckle Bros.* v. *Kirkpatrick*, 98 Tenn. 221, 250 (1897); *Aetna Powder Company* v. *Hildebrand*, 137 Ind. 462, 470 (1893); see 1 Mechem, Sales (1901) sec. 43.

The obligation of the Company is not to account for the proceeds of the sale but to pay a fixed price (R. 163). The contract provides a general formula involving three factors for determination of the

amount per kilowatt-hour to be paid the City. The agreement is that the Company shall pay to the City 26.935 percent of 2.383 cents per kilowatt-hour for 76 percent of the energy delivered by the City at Newark (Par. 5, R. 83), and that payment shall be made in monthly instalments (Par. 7, R. 84). In the first place, it is to be noted that on its face the formula demonstrates that the price received by the City is largely unrelated to the price received by the Company from the consumers. The two percentage factors are fixed and the 2.383 cents per kilowatt-hour, the average net revenue per kilowatt-hour of the Company in 1924 (R. 83), obviously becomes an arbitrary figure when used for later years. Even under the same prevailing rates the average unit revenue in later years might vary as the result of shifts in the relative proportion of energy sold at different rate brackets.[13] There is, therefore, no necessary relation between the average amount per unit received by the Company and the amount per unit paid to the City. Neither is there any fixed relation between the average revenue per unit and the amount which the City contends is retained by the Company merely as compensation for services. This amount is fixed at 73.065 percent of 2.383 cents regardless of any

[13] Users of great quantities of energy pay a lower rate per kilowatt-hour than smaller consumers. Thus an expansion of industry would lower the average revenue per kilowatt-hour, and an expansion of domestic consumption would have the opposite effect (R. 297).

increase or decrease in actual average revenue per unit. The Company, therefore, does not account to the City for the proceeds of the retail sales, but becomes obligated on a fixed day each month to pay a fixed price for the energy received by it or available for delivery to it.[14]

The fact that the contract in terms provides that the amounts to be retained by the parties shall be proportionately increased or decreased "should the present established rates for the sale of electric energy in San Francisco be hereafter increased or decreased by lawful authority" (Par. 8, R. 85), does not render the obligation assumed by the Company one to account for the proceeds merely. In the first place, the sliding scale provided does not change according to the average revenue per kilo-

[14] It should also be noted that even if the contract may properly be regarded as making the delivery at Newark a consignment, nevertheless such a relationship may change in its legal nature during the course of the transaction. And when, as here, the consignee is permitted to sell on such terms as he pleases and is bound, whether he sells or not, to pay the consignor at a fixed time a fixed price, a sale by him of any part of the consigned goods becomes in effect a purchase and resale of that part. *Mitchell Wagon Co.* v. *Poole*, 235 Fed. 817, 820 (C. C. A. 6); *In re Chalmers*, 206 Fed. 143, 144 (Mont.). Under such circumstances, it is held that the proceeds of sales by the consignee do not belong to the consignor, who becomes a mere creditor of the consignee at the time of sale to the third person. *Ex parte White*, L. R. 6 Ch. App. 397, 403–405 (1870); *Nutter* v. *Wheeler*, 18 Fed. Cas. No. 10,384, pp. 499–500 (Mass.); *Aetna Powder Company* v. *Hildebrand*, 137 Ind. 462, 468–471 (1893); *Vermont Marble Co.* v. *Brow*, 109 Cal. 236, 240 (1895).

watt-hour, but according to the "established rates for the sale of electric energy in San Francisco." The average revenue per kilowatt-hour may or may not change according to a fluctuation in the rates because of possible shifts in relative proportions of energy sold at different prices in commercial and domestic rate brackets (R. 297) (see fn. 13, *supra*). At best the price the City receives can be said to be based only upon a prediction of what the Company would receive, and such a prediction is one of the elements affecting the determination of practically every wholesale price.

It is further to be noted that the provisions of this paragraph were never observed. Rate reductions decreased the net revenue of the company from 2.383 cents per kilowatt-hour in 1924 to 2.361 cents in 1935, 2.238 cents in 1936, and 2.113 cents in 1937, representing decreases below the average rate of return fixed in the contract of 1, 6, and 11 percent, respectively (R. 296–297), but there was no change in the compensation paid to the City (R. 288–290).[15] Thus, as would any other contract

[15] Plainly without significance is the estimate that over the twelve-year period 1925–1937, the City received $26,000 more than it would have received if the return to it had been based on the twelve-year average revenue (R. 299). The calculation merely supports the view of the district court that before the rates were lowered, the Company was collecting more than its contract share of the income from consumers (R. 112) and hence was reaping a profit over and above its contract share asserted by the City to be a "reasonable charge for such service and the use of such corporation's facilities" (R. 64).

vendee, the Company alone bore the loss incident to reduction in market price to the ultimate consumer. A fixed price was contemplated and paid.[16]

2. *The Company sells Hetch Hetchy energy to the City.*—Among many other elements which indicate sale rather than agency is the fact that the Company sells to the City energy which in part originates at Hetch Hetchy and at a price which has no relation to the terms of the contract. The respondent's insistence on a mere agency relation thus necessarily involves the contention that the City through an agent sells Hetch Hetchy energy to itself. To the extent that the 73.065 percent retained by the Company represents compensation for its services in selling under the respondent's theory, the Company is charging the City for selling energy to itself. The suggestion of the circuit court of appeals that this was a practical method

[16] This is only one of the features which distinguish this case from *Los Angeles G. & E. Corp.* v. *Los Angeles*, 188 Cal. 307 (1922), cited by respondent as involving a similar contract (Br. in Opp., p. 12). In that case the contract provided that the companies should collect the money for electric energy supplied to consumers and pay to the City "daily as collected all sums collected," less certain sums to be retained by the companies for keeping the distributing systems in repair and to be applied on the purchase price of the plants which it was contemplated the City should purchase from the companies. Perhaps of even greater significance is the fact that the entire conduct of the business under the contract in that case was subject to the supervision and approval of a board upon which the City and the companies were equally represented. See p. 316, recognizing the distinctions which make the contract in the principal case one of sale.

for arriving at the compensation to be paid the Company for transmission and use of its facilities (R. 673) is plainly wrong. The City purchases its energy for municipal purposes at regularly published schedules, and there is no showing that these schedules are fixed with any relation to the price which the Company pays under the contract for energy from Hetch Hetchy. It seems clear, moreover—at least there is no showing to the contrary—that the rate base for the municipal schedule includes an allowance for the cost of generation in, and transmission from the Company's own numerous plants.[17]

3. *The Company fails to segregate revenues derived from Hetch Hetchy energy.*—Again, the failure of the contract to require or of the Company otherwise to provide for a segregation or other apportionment of any of the funds collected by it, part of which under the theory of agency belong to the City, further indicates that the Company is a purchaser and reinforces the inference of sale arising from the other provisions. *In re Wells*, 140 Fed. 752, 754 (M. D. Pa.); *In re United States Electrical Supply Co.*, 2 F. 2d 378, 380 (S. D. Ill.); *In re Leflys*, 229 Fed. 695, 697 (C. C. A. 7). See 1

[17] Moreover, the report of the City's chief valuation and rate engineer shows that in the 73.065 percent fixed in the contract as payable to the Company there is included an item for Uncollectible Reserves (R. 435), which means "uncollectible accounts." Thus, under the City's theory of agency, the City as principal is required to make an allowance to the Company as agent for the assumption by it of the risk of loss on an account owed by the City to itself.

Mechem, Agency (2d ed., 1914), sec. 1335; *Lance* v. *Butler*, 135 N. C. 419, 422 (1904).

4. *The Company names itself as sole creditor in bills to consumers.*—Aside from the fact that the City's theory involves the violent assumption that the Company acquiesced in becoming an agent for the sale of energy to those whose custom it formerly enjoyed as vendor, the practice of the Company in naming itself as the sole creditor in bills to consumers (R. 164) amounts to a holding out of the Company as the owner, ordinarily considered an earmark of sale. *In re Wayside Furniture Co.*, 67 F. 2d 201, 202 (C. C. A. 7); *D. M. Ferry & Co.* v. *Hall*, 188 Ala. 178, 190 (1914); see *In re Caldwell Machinery Co.*, 215 Fed. 428, 430 (W. D. Wash.).

5. *The Company is not subject to the City's direction in the fixing of rates to consumers.*—When prices to consumers are not set by the alleged principal, the transaction is normally one of sale. *In re Wells*, 140 Fed. 752, 754 (M. D. Pa.); *In re United States Electrical Supply Co.*, 2 F. 2d 378, 383 (S. D. Ill.); *In re Leflys*, 229 Fed. 695, 697 (C. C. A. 7); *In re Linforth*, 15 Fed. Cas. No. 8,369 at 560 (C. C. Cal.); *In re Wayside Furniture Co.*, 67 F. 2d 201, 202 (C. C. A. 7); *Chickering* v. *Bastress*, 130 Ill. 206 (1889). In the instant case, if the Company were acting as agent for the City, the City would fix its rates, but the City placed no limitation on the prices which the Company might charge to consumers, except that they should not exceed the lawfully established rates (R. 81). In

doing this, the City abdicated its otherwise unfettered power under the state constitution to fix the rates without regard to those established by the State Railroad Commission (R. 163). The trial court properly deemed this feature of the relationship indicative of a sale (R. 115–116).

6. *The Company has complete control of the energy.*—The contract plainly reserves no power of control in the City over the distribution of the energy (R. 161). The record shows that the amount of energy drawn from the Moccasin plant to be marketed by the Company is exclusively under the control of the load dispatcher of the Company (R. 283–284, 302–303). It is the City which is agent of the Company for the purpose of generating the energy. The City's lack of control is not only physical but complete.

The court below said that the Company's control is only over distribution of the energy, and that since distribution of the energy occurs simultaneously with its delivery to the Company the element of control is unimportant (R. 670). Since the Company's dispatcher controls the amount of energy drawn from the City's plant at any given time, the Company's control is not strictly limited to distribution. Nor is it material that the interval of time occupied by distribution is infinitesimal. The control of the Company's load dispatcher is not altered merely because electricity travels 186,000 miles per second. It is well settled that

power of control in the transferee indicates that title has passed. *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 354; *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490, 499; *In re Wood*, 140 Fed. 964 (M. D. Pa.); *D. M. Ferry & Co.* v. *Hall*, 188 Ala. 178, 184, 190–191 (1914); *Mennis* v. *Manning & Co.*, 136 Ill. App. 406, 409 (1907); *Norwegian Plow Co.* v. *Clark*, 102 Iowa 31, 40 (1897); *Chickering* v. *Bastress*, 130 Ill. 206, 216 (1889). See 1 Restatement, Agency (1933) sec. 1; sec. 1, coms. a and b; sec. 14; and sec. 14, com. b.[18]

7. *The company bears the risk of loss.*—It is the Company and not the City, under this contract, which bears the risk of loss. It is well recognized by the cases that the risk of loss accompanies title to the goods in the absence of a contrary expressed intention. *Coweta Fertilizer Co.* v. *Brown*, 163 Fed. 162, 165 (C. C. A. 6); *In re Rabenau*, 118 Fed. 471, 477 (W. D. Mo.); *Wood M. & R. Co.* v. *Brooke*, 30 Fed. Cas. No. 17,980 at 515 (Ore.); *Arbuckle Bros.* v. *Kirkpatrick*, 98 Tenn. 221, 251 (1897); see

[18] The City argues that because the contract is terminable on one day's notice, ultimate control is reposed in the City, but it must be conceded that until termination occurs, the control continues in the Company. The arrangement which has thus persisted for fifteen years and the right to continue which indefinitely the City is now defending at the bar of this Court, marks as a sale all disposition of energy under the contract to date; and the sales character of such disposition would not be affected by any termination which might hereafter occur. It is on the basis of the past and present dispositions that this suit is presented for adjudication.

Donlan v. *Turner, Dennis & Lowry Lumber Co.*, 282 Fed. 421, 424–425 (C. C. A. 9); *The Elgee Cotton Cases*, 22 Wall. 180, 194; 4 Williston, Contracts (Rev. ed. 1936) secs. 962, 963.[19]

Even if no one of the above factors was sufficient by itself to characterize the contract as one of sale, which is not conceded, it is submitted that the combination of so many factors pointing in the same direction compels the conclusion that the City is selling its energy to the Company for resale to consumers in violation of the conceded prohibition of the Raker Act.

CONCLUSION

The important question in this case is whether the City, by transferring to the Company for a consideration the right to sell Hetch Hetchy energy is violating the Raker Act. For the reasons set forth in Point I, the United States submits that this is exactly what the City is doing and that it is exactly what the statute forbids it to do. The question whether title to the energy is transferred to

---

[19] The deduction of 24 percent of the energy delivered at Newark is, as the court below held, without bearing, since it was computed on average loss (R. 671). A certain measurable amount of electric energy is always necessarily consumed as an incident of its transmission (R. 432–434); cf *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 190. The 24 percent deduction was inserted in the contract to provide for this factor and bore no relation to and provided no deduction for the actual physical loss which might arise from fortuitous causes, such as accident or theft.

the Company is entirely immaterial where, as here, the right to sell is transferred. If it were material, however, the contract, when considered as a whole and in connection with the action of the parties under it, clearly shows a sale of the energy to the Company. In either event, the statute is being violated and the City has resisted all attempts of the Government to obtain its observance. For this reason, the United States is now entitled to have its violation enjoined. Raker Act, sec. 9 (*u*) (R. 35); *Oregon & Cal. R. R.* v. *United States,* 238 U. S. 393. Hence, it is respectfully submitted that the decree of the circuit court of appeals should be reversed.

FRANCIS BIDDLE,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
WILLIAM D. DONNELLY,
Special Assistant to the Attorney General.
LAWRENCE S. APSEY,
ROBERT H. FABIAN,
Attorneys, Department of Justice,
Washington, D. C.

FREDERIC L. KIRGIS,
First Assistant Solicitor,
Department of the Interior.

MARCH 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940